



**REGULATIONS EP-40-01
THROUGH EP-40-30**

RULES OF PROCEDURE

**ADOPTED
JUNE 18, 1973
EFFECTIVE
JULY 5, 1973**

FILED
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RECEIVED
SECRETARY OF STATE
PER

FINDING AND ORDER

1. That due notice of public hearing, pursuant to the Administrative Procedure Act, was given, that the hearing was held on March 26, 1973 and that all persons were afforded an opportunity to be heard; and
2. That upon due consideration, and upon the basis of the statements made at the public hearing and in written comments submitted in relation to this matter, the adoption of regulations EP-40-01 through EP-40-30, inclusive, in final form, and the rescission of regulations HEwp-5-01 through HEwp-5-17, inclusive, is reasonable, within the purview of authority provided by law, and is consistent with public notice.

ORDERED, That said proposed regulations EP-40-01 through EP-40-30, inclusive, in final form, be adopted, and that said regulations HEwp-5-01 through HEwp-5-17, inclusive, be rescinded.

It is further

ORDERED, That the effective date of the new regulations and the rescission of the existing regulations contained in the proposal shall be July 5, 1973.

It is further

ORDERED, That three copies of the Finding and Order and three certified copies of the new regulations, in final form, be filed with the Secretary of State as required by law.

A handwritten signature in cursive script, reading "Ira L. Whitman".

Ira L. Whitman, Ph.D
Director of Environmental Protection

Issued at Columbus, Ohio

This 18th day of JUNE 1973.

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SECRETARY OF STATE

PER

STATE OF OHIO
THE ENVIRONMENTAL PROTECTION AGENCY

CERTIFICATION

I, Ira L. Whitman, Director of Environmental Protection,
State of Ohio, do hereby certify that the attached is an
exact copy of regulations EP-40-01 through EP-40-30,
inclusive, in final form, adopted by Order of JUNE 18th,
1973, to become effective JULY 5th, 1973.

Ira L. Whitman

Ira L. Whitman, Ph.D.
Director of Environmental Protection

Sworn to and subscribed in my presence by Ira L. Whitman,
this 18th day of JUNE, 1973.

Mary K. Deverse
Notary Public

MARY K. DEVERSE
NOTARY PUBLIC, FRANKLIN COUNTY, OHIO
MY COMMISSION EXPIRES SEPT. 23, 1979

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SECRETARY OF STATE

STATE OF OHIO

ENVIRONMENTAL PROTECTION AGENCY

PER _____

PROCEDURAL RULES

EP-40-01

APPLICABILITY

(A) These Rules shall govern procedure for all adjudication hearings, public meetings, and other proceedings relating to adjudicatory acts conducted by the Ohio Environmental Protection Agency or by its duly authorized hearing examiners pursuant to Chapters 119, 3704, 3745, 6111, and Sections 1505.07, 1509.081, 3707.42, 3734.02, 6101.13, 6101.39, 6103.17, 6112.02, 6117.34, 6117.46, and 6119.35, Ohio Revised Code, or any other statute requiring an adjudication hearing before the Agency.

(B) These Rules shall be effective 10 days after enactment and shall govern all procedural questions in new or pending proceedings arising thereafter.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

DEFINITIONS

As used herein:

(A) "Act" shall mean any statute administered by the Ohio Environmental Protection Agency.

(B) "Action" shall mean the issuance, modification, or revocation of any lawful order, other than an emergency order; the issuance, denial, renewal, modification, or revocation of a license, permit, lease, variance, or certificate; or the approval or disapproval of plans and specifications pursuant to law or regulation thereunder.

(C) "Adjudication hearing" shall mean an adversary proceeding at which are determined rights, duties, privileges, benefits or legal relationships of a specified person.

(D) "Agency" shall mean the Ohio Environmental Protection Agency.

(E) "Director" shall mean the Director of Environmental Protection of Ohio.

(F) "Fact sheet" shall mean the statement of facts provided for in EP-40-06(A), relative to an application for issuance or renewal of a permit under Section 6111.03(J), Ohio Revised Code.

(G) "Final action" shall mean the decision on any adjudicatory matter when all administrative remedies have been exhausted, or waived by failure timely to pursue such remedies.

(H) "Hearing examiner" shall include the Director when he personally conducts a hearing or performs any other act which hearing examiners are authorized to perform.

(I) "Initiation of hearing proceedings" shall mean the occurrence of that event which requires that an adjudication hearing be held, including but not limited to, a request for a hearing pursuant to Section 3745.07, Ohio Revised Code, service of a verified complaint upon an alleged violator pursuant to Section 3745.08, Ohio Revised Code, and notice of a hearing pursuant to Section 6111.32, Ohio Revised Code.

(J) "Party" shall mean (1) the State or Agency and the applicant or respondent; (2) any person who requests an adjudication hearing pursuant to EP-40-13(A); or (3) any person who intervenes pursuant to Rule EP-40-15.

(A) The duties of the Hearing Clerk shall be performed by the employee, designated by the Agency as Hearing Clerk, together with such assistants as he may require to accomplish his duties. The Hearing Clerk shall:

(1) Immediately upon initiation of hearing proceedings, open a hearing file and assign a docket number to the proceedings.

(2) Be the custodian of all hearing files for the Agency.

(3) Upon initiation of hearing proceedings, include in the hearing file copies of the proposed action, all notices, the fact sheet where one is required, and all written comments and recommendations received by the Agency.

(4) During the pendency of the proceedings carefully preserve in the hearing file all papers delivered to him for that purpose and all written comments and recommendations pertaining to the proceedings received by the Agency, recording on all such papers the date of receipt thereof.

(5) Permit any person to make a copy of any papers in the hearing file or other files of the Agency in his possession except where such matters are privileged.

(6) Effect all notices pertaining to Agency public meetings and adjudication hearings required by statute, rule, or regulation.

(7) Prepare and certify the record or documents in the hearing file in any instance where certification by the Agency or Director is required by law.

(8) Perform such other duties as are assigned to him by the Director.

(B) The acceptance of papers or documents for filing or the commission of any other act by the Hearing Clerk shall not be construed as an admission by the Agency of the validity or proper filing of such paper or of compliance with any procedural requirements imposed by statute or regulation.

(A) Except as provided in Section EP-40-05(D), in all actions of the Agency, the Director shall prepare and give notice to the parties of a proposed action without an adjudication hearing. The proposed action shall be in the same form as, and include all elements of, a final action and where issuance of permits is proposed, shall include a proposed permit. Any person may file comments or request an adjudication hearing as provided by these Rules. The Director may hold a public meeting on an application for a permit or variance or renewal thereof prior to the issuance of a proposed action.

(B) If no adjudication hearing is held, or if no public meeting is held subsequent to the issuance of a proposed action, the Director, after consideration of all written comments submitted within thirty days of public notice of the proposed action, or such longer period specified in the public notice, shall: (1) issue the proposed action as his final action; (2) permit the proposed action to become final if the proposed action provides that the proposed action will become final unless withdrawn by the Director prior to the expiration of a specified period of time; or (3) withdraw the proposed action and issue a revised proposed action. A revised proposed action shall be treated in all respects as a proposed action except that the Agency need not hold further public meetings.

(C) The Director may withdraw a proposed action at any time before the proposed action becomes final.

(D) Notwithstanding the provisions of EP-40-05(A) above, the Director may issue a final action without a hearing where the rules of the Agency or the statutes pertaining to the Agency specifically give a right to appeal to the Environmental Board of Review and also give the appellant a right to a hearing de novo on such appeal, and where no statutory provision or regulation prohibits such action from being effective before persons permitted by statute or regulation to participate in an adjudication hearing have been afforded an opportunity for a hearing.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

EP-40-06 FACT SHEETS

(A) Before the Director issues a proposed action on any application for issuance or renewal of a permit pursuant to Section 6111.03(J), Ohio Revised Code, for a discharge which has a total volume of more than 500,000 gallons on any day, the Agency shall prepare a fact sheet which shall include:

(1) A sketch or detailed description of the location of the discharge described in the application;

(2) A quantitative description of the discharge described in the application which includes at least the following:

(a) The rate, quantity, and character of the proposed discharge; if the discharge is continuous, the average daily flow in gallons per day or million gallons per day.

(b) For thermal discharges, the average summer and winter temperatures in degrees Fahrenheit; and

(c) The average daily discharge in pounds per day of any pollutants which are present in significant quantities or which are subject to limitations or prohibition under applicable water quality or effluent standards.

(3) The proposed action of the Director including the terms, specifications, conditions, and limitations of any permit proposed to be issued;

(4) Description of the uses for which the receiving waters have been classified, if any, and identification of the applicable water quality and effluent standards;

(5) Description of the procedures for the formulation of final determinations including:

(a) The period, not to be less than thirty days, in which the public may comment upon the proposed action;

(b) Procedures for requesting a public meeting or adjudication hearing and the nature and procedure of such meetings and hearings; and

(c) Any other procedures by which the public may participate in the formulation of the final determinations.

NOTICES

(A) The Agency shall give public notice of all applications for issuance, modification, or renewal of permits, licenses, variances, and of proposed actions, actions, verified complaints, public meetings and adjudication hearings. Such notice shall be:

(1) Published once in a newspaper having general circulation in the county in which the source or facility is located. This notice may be summary in form specifying the source or facility involved, the owner, the type of action proposed if any, and the address of the Agency from which further information, including the full notice, may be obtained.

(2) Mailed, on or before the date of publication, by first class mail to all persons on the current mailing list of subscribers maintained by the Director pursuant to Section 3745.07, Ohio Revised Code. This notice may be summary in form specifying the source or facility involved, the owner, the type of action proposed, and the address of the Agency from which further information, including the full notice, may be obtained.

(3) Mailed on or before the date of publication to any person who has requested notice concerning the source or facility or the owner thereof, or who has requested a copy of the application, the proposed action or the fact sheet.

(4) In the case of any proposed action for issuance or renewal of a permit under Section 6111.03(J), Ohio Revised Code, mailed on or before the date of publication to any state, interstate, federal, or local governmental agency having jurisdiction over waters which may be affected by the Agency's action.

(B) For purposes of determining the time of notice, public notice is complete upon publication as required in subparagraph (A) (1) above.

(C) After receipt by the Agency of a completed application for issuance, modification, or renewal of a permit, license, certificate, or variance or filing of a verified complaint under Section 3745.08, notice thereof shall be mailed within one week and published within ten days. In all cases, notice of hearings and public meetings shall be given at least thirty days prior to the date of hearing or meeting. Notices of proposed actions shall be given at least thirty days before such proposed action becomes final.

(A) Public notices of proposed actions for issuance, or renewal of permits under Section 6111.03(J), Ohio Revised Code, shall include:

(1) The name of the Agency and the address and telephone number of the facilities where Agency files and records pertaining to the application are located and may be inspected and copied, and instructions for persons desiring to obtain additional information or a copy of any fact sheet prepared or of the proposed permit; and instructions to persons desiring to be included on the mailing list provided for in EP-40-06(B).

(2) The name and address of the applicant.

(3) A brief description of the applicant's activities or operations which result in the discharge described in the application.

(4) The location of the source or operation including the waterway to which each discharge is made, and a short description of the location of each discharge on the waterway indicating whether such discharge is a new or an existing discharge.

(5) A statement of the Director's proposed action to issue or deny the permit for the discharge described in the application.

(6) A statement:

(a) that the proposed action of the Director shall become final on the effective date specified in the proposed action unless (1) an adjudication hearing is requested or (2) the Director revises or withdraws the proposed action after consideration of the record of a public meeting or written comments, or upon disapproval by the Administrator of the United States Environmental Protection Agency;

(b) that any person may submit a written statement within thirty days as to why the Director should revise the proposed action;

(c) that if significant public interest is shown a public meeting may be held on motion of the Director prior to issuance of any final action; and

(C) Public notice of verified complaints filed pursuant to Section 3745.08, Ohio Revised Code, or complaints filed pursuant to Section 6111.32, Ohio Revised Code, shall include to the extent known to the Agency:

(1) The name of the agency and the address and telephone number of the facilities where further information may be obtained and agency files and records pertaining to the proceedings may be inspected and copied.

(2) The name and address of the party filing the complaint.

(3) The name and address of the person against whom the complaint was filed.

(4) A short description of the location of the source or operation, including for discharges to waters of the State, the waterway to which the discharge is made.

(5) A brief description of the activities or operations of the party against whom the complaint was filed as they pertain to the controversy.

(6) A statement that any person within thirty days may submit a written statement to the Director concerning the facts or opinions relating to the matter raised in the complaint.

(7) A statement that any person may request notice concerning further actions pursuant to the complaint, including the outcome of the proceedings.

(D) All other public notices from the Agency shall include to the extent known to the Agency:

(1) The name of the agency and the address and telephone number where further information may be obtained and agency files and records pertaining to the proceedings may be inspected and copied.

(2) The name and address of the person responsible for the source.

(3) The location of the source, including for discharges to waters of the State the waterway to which the discharge is made.

NOTICE OF WATER PERMIT APPLICATIONS

TO GOVERNMENT AGENCIES

(A) The notice required by EP-40-07(A)(4) to be given to state and governmental agencies shall include:

(1) The information required in EP-40-08 for public notices, and may include a copy of such public notice.

(2) A statement that such state or agency may submit written recommendations to the Director, and to the Regional Administrator of the United States Environmental Protection Agency, which the Director may incorporate into the permit if issued and that if the recommendation of the state or agency is not incorporated in the final action of the Director, a written explanation of his reasons for not accepting the recommendation will be provided that state or agency and the Regional Administrator of the United States Environmental Protection Agency.

(3) A copy of the fact sheet and a statement that a copy of the application for a permit or of the proposed permit including all ancillary papers will be provided upon request.

(B) The notice required by EP-40-07(A)(4) shall also be given, when applicable, to:

(1) Any agency responsible for an "Areawide Waste Treatment Management Plan" pursuant to Section 208(b) of the Federal Water Pollution Control Act Amendments of 1972.

(2) Any agency responsible for the preparation of a plan pursuant to an approved continuous planning process under Section 303(e) of the Federal Water Pollution Control Act Amendments of 1972.

(3) Public health agencies for the purpose of assisting the applicant in coordinating the applicable requirements of the Act with any applicable requirements of such public health agencies.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

EP-40-11 FILING OF PAPERS

(A) An original and two copies of all papers shall be filed with the Hearing Clerk, and copies shall be served upon all parties. If a party is represented by an attorney, service shall be made upon the attorney.

(B) All items except copies of documents filed in the proceedings shall be on eight and one-half by eleven inch paper and shall be entitled "Before the Ohio Environmental Protection Agency" and shall be styled with the name of the applicant or respondent, as the case may be (e.g., "In the Matter of _____, Applicant" or "In the Matter of _____, Respondent"), and shall set forth the docket number of the case except where no docket number has been assigned.

(C) All papers shall be deemed filed upon receipt by the Hearing Clerk.

(D) In computing any period of time prescribed for filing and serving a document, the day upon which the document or notice of the action to be contested or answered was received, or the day of any other event after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation.

(E) Any request for an extension of time must be filed within the time allowed for the filing or serving of the document with the Agency.

(F) Papers filed with the Hearing Clerk shall not be considered by the Hearing Examiner unless proof of service is endorsed thereon. The proof of service shall state the date and manner of service and shall be signed by the party filing such paper or his attorney.

(G) All papers filed by a party shall be typewritten and shall have typed or printed thereon the name, address, and telephone number of the party or his attorney if he has one. If a party is represented by a firm of attorneys, a particular attorney within the firm having primary responsibility for the case shall be indicated on such paper. All papers filed shall be signed by the party or his counsel.

(A) Within thirty days of notice of the Director's proposed action to issue or renew a permit, any person may request or petition for a public meeting for presentation of evidence, statements, or opinions.

(B) If the Director determines that there is significant public interest in a proposed action or where required to do so by statute or regulation, the Director shall hold a public meeting in the county where the source or facility affected is located, or in a contiguous county, at which meeting interested persons may submit written or oral statements and present evidence concerning the proposed action. If an adjudication hearing is held on the same proposed action, the Director may hold such meeting and hearing so that one proceeding will commence immediately following the close of the other, or hold such meeting and hearing on separate occasions. In the consideration of an application for issuance or renewal of a permit or variance, the Director may hold a public meeting prior to issuance of a proposed action.

(C) In any public meeting, the Director may appoint a Hearing Examiner to conduct such meeting. On the date and at the time and place specified in the notice, the public meeting shall be held, at which any person (1) may appear and be heard in person or by his attorney, or both; (2) may present his position, arguments, or contentions orally or in writing; and (3) may, in the discretion of the Director or Hearing Examiner, question or examine persons who appear to present positions, arguments, or contentions at such meeting.

(D) Comments received or evidence or statements presented at a public meeting held pursuant to this Rule shall be considered by the Director, who shall issue a proposed action, or, if the public meeting was held subsequent to the issuance of a proposed action, may withdraw the proposed action or issue a revised proposed action. A revised proposed action shall be treated in all respects as a proposed action under these Rules, except that the Agency need not hold further public meetings.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

REQUESTS FOR ADJUDICATION

Former regulations removed
 10-2-qwHH through HWP-2-10
 8, August 1973, evidence
 1, 8 August 1973, evidence
 1, 8 August 1973, evidence

(A) An adjudication hearing shall be held in accordance with these Rules (1) upon receipt of a request for a hearing from the applicant within thirty days of notice of the proposed action, or (2) upon receipt of an objection by any person pursuant to Section 3745.07, Ohio Revised Code.

(B) All requests for adjudication hearings shall be in writing. Proposed actions together with requests for adjudication hearings shall constitute the pleadings for hearings held pursuant to these rules. All requests for adjudication hearings shall state the questions to be considered at the requested hearing, enumerating the specific findings, orders, or actions of the Agency objected to, and shall state reasons why such provisions of the proposed action are contested. Failure to comply with this subsection shall constitute a default. If a party desires to request that an adjudication hearing be held at a specific time or place, such request shall be included in the hearing request.

(C) When an adjudication hearing is duly requested, or when an objection requesting a hearing is duly made pursuant to Section 3745.07, Ohio Revised Code, the proposed action shall not be considered an action of the Director, but a proposal upon which evidence is to be heard.

(D) The person filing an objection requesting an adjudication hearing pursuant to Section 3745.07, Ohio Revised Code, shall be a party to the hearing and the Agency may participate in the hearing actively or refrain from active participation permitting the other parties to prosecute the proceedings.

(E) If the opportunity for an adjudication hearing is not availed of within the requisite time period, all persons entitled to request a hearing shall be deemed to have waived all rights to a hearing and all rights to contest the Director's action, and they shall be deemed to have consented to the proposed action which shall become final and as valid as if a hearing had been held at which sufficient reliable, probative, and substantial evidence had been presented in support thereof.

AUTHORITY AND DUTIES OF HEARING EXAMINERS

(A) Adjudication hearings shall be conducted before a Hearing Examiner except where the Director determines to hear the case.

(B) Immediately upon receiving notice of initiation of the hearing proceedings from the Hearing Clerk, the Chief Hearing Examiner shall assign a Hearing Examiner to the case.

(C) The Hearing Examiner shall conduct hearings in such a manner as to prevent unnecessary delay, maintain order, and ensure the development of a clear and adequate record.

(D) The authority of the Hearing Examiner shall include, but not be limited to, authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas to require the attendance of witnesses at hearings and depositions;
- (3) Compel all parties to state their positions in writing with respect to the controversy;
- (4) Examine witnesses and direct witnesses to testify;
- (5) Make rulings on the admissibility of evidence;
- (6) Make rulings on procedural motions, whether such motions are oral or written;
- (7) Hold conferences to discuss settlement or for the simplification of issues pursuant to EP-40-10;
- (8) Request the parties or their attorneys to file suggested findings, orders, conclusions of law and briefs before or following the hearing and within such time limits as he may determine;
- (9) Request any party or counsel to prepare entries, findings, or orders;
- (10) Take such other action as may be necessary to accomplish the purposes of subsection (C).

INTERVENTION

(A) Any person may file a motion for leave to intervene in an adjudication hearing conducted under these Rules. A motion must set forth the grounds for the proposed intervention and the position and interest of the movant in the proceedings. A motion shall be accompanied by a pleading setting forth the matter for which intervention is sought. Movant shall serve a copy of the motion and pleading upon the parties as provided in Rule EP-40-17.

(B) A motion for leave to intervene in a hearing must ordinarily be filed prior to the commencement of the first prehearing conference, or, if no prehearing conference is held, fifteen (15) days prior to commencement of the hearing. Any motion filed after that time must contain, in addition to the information set forth in subsection (A) of this Rule, a statement of good cause for the failure to timely file the motion and shall be granted only upon a finding (1) that extraordinary circumstances justify the granting of the motion; or (2) that the intervenor shall be bound by agreements, arrangements, and other matters previously made in the proceeding.

(C) Leave to intervene will be freely granted. The factors to be considered by the Hearing Examiner in granting leave to intervene shall include, where relevant: (1) the nature and extent of the movant's interest in the subject matter of the hearing and the degree to which the disposition of the hearing may as a practical matter impair or impede his ability to protect that interest; (2) the adequacy of the representation of movant's interest by existing parties; (3) the relationship of movant's interest to the subject matter of the hearing; (4) the avoidance of multiplicity of suits; (5) whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties; (6) the contribution the movant may make to the just determination of the issues.

(D) In any hearing in which intervention is granted under this Rule, the Hearing Examiner, in the interest of just and expeditious adjudication, may impose reasonable conditions or restrictions on the extent of the intervenor's participation in the proceedings.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

EP-40-16 (RESERVED)

MOTIONS

(A) All applications to the Hearing Examiner concerning procedural relief, including determinations of jurisdiction, shall be by motion which, unless made before the Hearing Examiner with a hearing stenographer in attendance, shall be made in writing. A written motion shall state with particularity the relief or order sought and shall be accompanied by a memorandum setting forth the grounds therefor.

(B) Within ten days after service of a motion, or such other time as fixed by the Hearing Examiner, any party may file and serve an answer to a motion. A movant may reply to an answer only with the permission of the Hearing Examiner. Procedural motions shall not cause delay of a hearing without a finding by the Hearing Examiner that good cause for such delay exists.

(C) Before deciding a written motion, the Hearing Examiner shall consider all memoranda filed. He shall file his written decision, including the procedural order issued, with the Hearing Clerk and shall serve copies on all parties. His ruling on all oral motions shall be included in the transcript except that he may elect to take the motion under advisement and issue a written ruling later.

(D) All decisions on procedural motions shall be subject to review by the Director upon review of the report of the Hearing Examiner.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

(A) Upon written notice by the Hearing Examiner to all parties, the parties or their attorneys may be directed to appear at a specified time and place for a conference, presided over by the Hearing Examiner, prior to or during the course of the hearing, to consider such matters as the Hearing Examiner shall direct; including, but not limited to:

- (1) The settlement of the controversy;
- (2) The simplification of the issues;
- (3) The disclosure of names, identities and location of witnesses together with a brief statement of what is proposed to be established by the testimony of each;
- (4) The limitation of the number of and the exchange of reports of expert witnesses expected to be called by either party;
- (5) Obtaining
 - (a) admissions of fact;
 - (b) stipulations as to the admissibility into evidence of documents and other exhibits to avoid unnecessary proof;
- (6) The exchange of documentary evidence to be submitted at the hearing.

(B) The Hearing Examiner may require the parties to prepare prehearing briefs prior to or subsequent to the prehearing conference covering such matters as he may specify.

(C) The proceedings at a prehearing conference shall be off-the-record, except that the Hearing Examiner may prepare, or order prepared, a prehearing conference report encompassing the agreements reached and decisions made at the prehearing conference, including any admissions, stipulations, or proposals agreed to. All offers of settlement, proposals of adjustment, and proposed stipulations not agreed to shall be privileged, shall not constitute admissions, and shall not be admissible in evidence against the person making the offer or proposal.

(A) Any party may serve interrogatories upon another party and take the deposition of witnesses within or without the State in the same manner as is prescribed in the Civil Rules and may require the production of such books, records, and papers as it desires and for that purpose may obtain from the Hearing Examiner a subpoena or a subpoena duces tecum, as in criminal cases.

(B) The files, books, and records of the Agency, other than communications with the Attorney General, materials or information obtained or prepared for use in pending hearing proceedings, materials or information not available for public inspection pursuant to regulation, and materials or information privileged pursuant to statutory provisions relating to trade secrets, shall be made available by the Agency during regular business hours for review and copying by any person, whether or not hearing proceedings are pending. The Agency shall provide facilities for the inspection of all Agency files and a machine or device for the copying of papers and documents for which it may charge a fee commensurate with the cost to the Agency of providing such equipment. A record of the location of all files in use by State employees and removed from such facility for that purpose shall be maintained and any such State employee shall permit any person to see such file upon request.

(C) No subpoena duces tecum shall be issued to compel production of the files, books, and records of the Agency for purposes of an adjudication hearing unless the Hearing Examiner finds that a person has been refused access to said records.

(D) No adjudication hearing shall be continued to a date more than sixty days after initiation of the hearing proceedings for the purpose of allowing a party to take depositions unless the Hearing Examiner finds in writing that the party requesting the continuance diligently pursued discovery but was unable to complete the taking of depositions by the unusual complexity of the case.

(E) Parties shall cooperate in conducting discovery procedures with a view to accomplish full and complete disclosure of all relevant facts. Informal consultation among parties concerning depositions shall be attempted before filing of formal motions to compel discovery.

(A) The Hearing Examiner shall admit all relevant and material evidence, except evidence that is unduly repetitious, even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value. In all hearings the testimony of witnesses shall be taken orally, except as provided by these rules or by the Hearing Examiner. Parties shall have the right to cross-examine a witness who appears at the hearing.

(B) If a party objects to the admission or rejection of any evidence, he shall state briefly the grounds for such objection. The transcript shall include any argument or debate thereon, unless the Hearing Examiner, with the consent of all parties, orders that such argument not be transcribed. The ruling of the Hearing Examiner on any objection shall be a part of the transcript. An automatic exception to that ruling will follow.

(C) A copy of each documentary exhibit filed with the Hearing Examiner shall be furnished to each other party. A true copy of an exhibit may, in the discretion of the Hearing Examiner, be substituted for the original.

(D) Whenever evidence is deemed inadmissible, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. If the evidence consists of a document or exhibit, it shall be inserted in the record in total. In the event the Director decides that the Hearing Examiner's ruling in excluding the evidence was erroneous, the hearing may be reopened to permit the taking of such evidence, or, where appropriate, the Director may evaluate the evidence and proceed to a final decision.

(E) Official notice may be taken of such matters as are within the expertise of the Hearing Examiners, provided, however, that the parties shall be given adequate opportunity to show that such facts are erroneously noticed.

EP-40-22 DIRECTOR NOT TO BE A WITNESS

The Director, the Assistant Director, and the Deputy Directors of the Agency, because of their duties in deciding, or aiding the Director in deciding, adjudicatory matters, shall not be competent witnesses nor subject to deposition in any adjudication hearing before the Agency. Evidence from other persons relating to the mental processes of these persons deciding adjudicatory matters shall not be admissible.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

REPORT OF HEARING EXAMINEROR PRESIDING OFFICER

(A) Within forty-five days following receipt of the transcript of an adjudication hearing and upon due consideration of the competent evidence admitted at the hearing, the oral arguments, and the briefs, if any, the Hearing Examiner shall submit to the Director by filing with the Hearing Clerk a written report setting forth findings of fact, conclusions of law, and recommendations of the action to be taken by the Director.

A copy of the written report and recommendations of the Hearing Examiner shall be mailed to all parties or their attorneys by certified mail within five days after the submission of such report to the Director. Any party or interested person shall have the right to submit to the Director, within ten days of receipt of such copy of such written report and recommendations, a written statement of objections to such written report and recommendations, which written statement of objections shall be considered by the Director before approving, modifying, or disapproving such recommendations. All such submissions to the Director shall be filed with the Hearing Clerk.

(B) Within fifteen days after the conclusion of a public meeting, the presiding officer shall prepare, and submit to the Director, a brief summary of the evidence, testimony, and opinions presented.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

EP-40-26 FINAL ACTION

(A) Not less than ten days after service of the written report of the Hearing Examiner upon the parties, the Director shall take final action based on the record, including such additional evidence as he shall order admitted, by issuing a written decision.

(B) The written decision of the Director may adopt the report of the Hearing Examiner, or parts thereof. When the decision of the Director disapproves or modifies the recommendations of the Hearing Examiner in whole or in part, the Director's written decision shall include:

(1) The reasons for rejecting the recommendations of the Hearing Examiner.

(2) Findings of fact and conclusions of law together with the reasons therefor with respect to all matters where the Director does not adopt the recommendations of the Hearing Examiner.

(C) The decision of the Director shall be entered on the Journal and into the record of the hearing and certified copy thereof together with a statement of the time and method by which an appeal may be perfected shall be served within five days of the Director's action upon the parties by certified mail, return receipt requested. Copies of the decision or order shall be served on all attorneys of record in the proceedings by ordinary mail.

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

REGISTERS OF CURRENT AND PAST ACTIONS

(A) The Agency shall maintain a register, indexed according to the name of the permit holder, applicant or respondent and by the County in which the source or facility is located, of all pending applications for permits, leases, licenses, variances, certificates, and for approval of plans and specifications, of all hearing proceedings pending, and of all other proposed actions not yet finalized, which register shall state the docket number, the dates on which such matter was filed, the hearing date and other relevant dates, and shall identify the files containing materials pertaining to the proceedings.

(B) The Agency shall maintain a register of all adjudicatory actions of the Agency indexed as required by (A) above, stating the date for the permit or orders where applicable, the hearing docket number if one was assigned, and identifying Agency files containing pertinent information.

(C) The registers maintained pursuant to (A) and (B) above shall be conveniently located, available to the public during reasonable hours, and shall be maintained in compliance with the provisions of EP-40-20(B).

Former regulations HEwp-5-01 through HEwp-5-16 inclusive, adopted August 8, 1972, effective August 28, 1972, are rescinded.

(Adopted June 18, 1973; effective July 5, 1973.)

In order to avoid all possibilities of prejudice, real or apparent, to the public interest and persons involved in proceedings pending before the Agency, the following rules of ethics shall be observed after the initiation of hearing proceedings:

(A) No party shall submit any ex parte, off-the-record communication to the Director, or to the Agency staff, or to the Hearing Examiner, about any matter in issue in an adjudicatory proceeding; and the Director, the Agency staff participating in the proceeding, and the Hearing Examiner shall not request or entertain any such ex parte, off-the-record communication.

(B) All communications prohibited by EP-40-30(A) above, shall be reported immediately to the Hearing Examiner who shall place the communication or a memorandum thereof in public files associated with the case, but separate from the record material upon which the Agency will rely in reaching a decision. The Hearing Examiner shall take such additional action as he deems advisable which may include recommending entry of a default on the part of the party guilty of the malfeasance.

(C) The Director and members of the Agency staff shall not offer opinions about any matter in issue in an adjudicatory proceeding to any other party thereto or such party's attorneys, at any time after hearing proceedings have been initiated.

(D) A Hearing Examiner shall at any time disqualify himself if for any reason he may not be able to preside in a fair and impartial manner and render an impartial report to the Director, or if he receives or has during the previous two years, received ten percent or more of his gross personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends (except that income from the State or from diversified investments where he does not know the identity of the primary sources of income shall not be included as contributing toward such percentage), from the applicant or respondent, or any subsidiary or owner thereof. To disqualify himself, a Hearing Examiner shall file an affidavit stating the reason for disqualification.

(E) In the exercise of adjudicatory functions, Hearing Examiners shall behave in the manner prescribed for judges generally in the Canons of Judicial Ethics of the Supreme Court of Ohio which Canons are hereby expressly incorporated by reference.